Cheah Swee Fah v Bank Bumiputra Malaysia Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–103 OF 1997
ZULKEFLI, RAUS SHARIF AND HELILIAH JJCA
8 OCTOBER 2007

Banking — Banks and banking business — Loan secured by charge — Whether bank in breach of contract or negligent in making progress payment upon presentation of architect's certificate — Whether existed duty to go behind architect's certificate

The plaintiff obtained a loan from the first defendant to finance the purchase of a property from a developer. Under the terms of the loan agreement, the first defendant was to make progressive payments to the developer at various stages of the construction of the property. Eight progressive payments had been made by the first defendant to the developer on behalf of the plaintiff before the project was abandoned in January 1983. Works on the property recommenced in 1985 and was completed in 1988. The plaintiff however contended that the eighth progressive payment was not due for payment at the time it was made by the first defendant and claimed for damages against the first defendant for negligence and breach of the first defendant's contractual duty under the loan agreement. The plaintiff sought an order that all interest charged by the first defendant on the eight progress payment from the date of release to the date of relevant accounting be credited back to the plaintiff. The plaintiff's claim was dismissed by the High Court. The plaintiff appealed to the Court of Appeal.

Held, dismissing the appeal:

(1) To impose on the bank any duty to ascertain the actual situation at the site or even for it to make inquiries would indeed place an onerous duty on the bank. In the absence of clear evidence that the first defendant was aware of the actual situation, or that being aware that there was something amiss in the architect's certificate, when it made the payment, it could not be said that the first defendant was in breach of any of its duties (see para 7).

(2) Under the terms of the contract there was no duty on the part of the first defendant to go behind the architect's certificate. Neither was the first defendant competent to do so. The allegation that the first defendant had been negligent and/or reckless in managing the finance of the housing project is tantamount to putting an extra duty on the first defendant of its contractual obligation both under the contract and under the charge (see para 9).

(3) There was no irregularity in the developer submitting the No 8 Certificate as they did and it follows that there was no negligence or breach of contract on the part of the first defendant to release the payments (see para 10).

(4) There is no standard format in the profession of architects to use for certificates issued under the schedule of payments. The contention that the words in the Schedule of Payments did not tally with the description in the certificate is therefore de minimis. It was a minor and immaterial error. Minor and immaterial errors will not invalidate a certificate (see para 11).

[Bahasa Malaysia summary

Plaintif memperoleh satu pinjaman daripada defendan pertama untuk membiayai pembelian hartanah daripada pemaju. Di bawah terma perjanjian pinjaman, defendan pertama hendaklah membuat bayaran ansuran kepada pemaju di pelbagai peringkat pembinaan hartanah. Lapan bayaran ansuran telah dibuat oleh defendan pertama kepada pemaju bagi pihak plaintif sebelum projek terbengkalai dalam bulan Januari 1983. Kerja-kerja atas hartanah bermula semula pada 1985 dan siap pada 1988. Plaintif bagaimanapun berhujah bahawa bayaran ansuran kelapan tidak dibayar pada masa ia dibuat oleh defendan oleh defendan pertama dan menuntut ganti rugi terhadap defendan pertama untuk kecuaian dan pelanggaran tanggungjawab kontraktual defendan pertama di bawah perjanjian pinjaman. Plaintif mohon satu perintah agar semua faedah yang dikenakan oleh defendan pertama ke atas bayaran ansuran kelapan dari tarikh perakaunan relevan dikreditkan semula kepada plaintif. Tuntutan plaintif ditolak oleh Mahkamah Tinggi. Plaintif merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Untuk mengenakan ke atas bank apa-apa tanggungjawab untuk menentukan keadaan sebenar di tapak tersebut ataupun untuknya membuat siasatan pasti meletakkan tanggungjawab yang membebankan ke atas bank. Dalam ketiadaan keterangan yang nyata bahawa defendan pertama sedar tentang keadaan sebenar, atau dengan menyedari bahawa terdapatnya sesuatu yang tidak kena dalam sijil arkitek, semasa ia membuat bayaran, ia tidak boleh dikatakan bahawa defendan pertama telah melanggar mana-mana daripada tanggungjawabnya (lihat perenggan 7).

(2) Di bawah terma kontrak tiada tanggungjawab di pihak defendan pertama untuk menyiasat sijil arkitek. Bahkan defendan pertama kompeten berbuat demikian. Pengataan bahawa defendan pertama adalah cuai dan/atau semberono dalam mengendalikan kewangan projek perumahan sama seperti meletakkan tanggungjawab lebih ke atas defendan pertama terhadap obligasi kontraktualnya di bawah kontrak dan cagaran tersebut (lihat perenggan 9).

(3) Tiada luar aturan di pihak pemaju mengemukakan Sijil No 8 seperti yang telah mereka lakukan dan dengan itu tiada kecuaian atau pelanggaran kontrak di pihak defendan pertama untuk melepaskan bayaran-bayaran tersebut (lihat perenggan 10).

(4) Tiada format standard dalam profesion arkitek untuk menggunakan berkaitan sijil-sijil yang dikeluarkan di bawah jadual bayaran. Hujah bahawa perkataan-perkataan dalam jadual pembayaran tidak sama dengan gambaran

dalam sijil-sijil tersebut yang oleh itu de minimis. Ia merupakan kesilapan kecil dan tidak penting. Kesilapan kecil dan tidak penting tidak akan menjadikan sijil itu tidak sah (lihat perenggan 11).]

Notes

For cases on loan secured by charge, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1988–1990.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 79 (refd)
Emson Contractors Ltd v Protes Estates Ltd (1987) 39 BLR 126 (refd)
Hilton v Westminster Bank Ltd (1926) 123 LT 358 (refd)

Appeal from: Civil Suit No S5–22(24)-710 of 1987 (High Court, Kuala Lumpur)

Chew Swee Yoke (SY Chew & Co) for the appellant.
K Maniam (Skrine) for the first respondent.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the plaintiff against the decision of the High Court at Kuala Lumpur which dismissed the plaintiff's claim for damages against the first defendant for an action in negligence and breach of its contractual duty under the loan agreement entered into between the plaintiff and the first defendant.

BACKGROUND FACTS OF THE CASE

[2] The relevant background facts of the case are as follows:

(1) The plaintiff together with other purchasers purchased a housing lot ('the property') each from a housing developer, Park Avenue Homes Sdn Bhd ('the developer'). The plaintiff obtained a loan from the first defendant. Under the terms of the loan agreement, the first defendant was to make progressive payments to the developer at various stages of the construction of the property.

(2) The arrangement of payment between the housing purchasers, the developer and the first defendant was in accordance with the loan agreement and the sale and purchase agreement entered into by the respective parties.

(3) Under the sale and purchase agreement the plaintiff covenanted inter alia that:

> ... the purchase price shall be paid by the plaintiff to the developer by instalments of such amounts and at such times as set out in the schedule of payments... All such instalments shall be paid by the purchaser to the developer within 14 days from the date of receipt of a notice in writing from the developer requesting the payment of

any such instalments due. Every such notice shall be supported by the requisite certificate of the developer's architect and shall be accepted by the plaintiff without objection or enquiry as conclusive of the fact that the works therein referred to have been satisfactorily completed.

(4) To finance the purchase of the said property, the plaintiff obtained a loan of RM138,000 from the first defendant on the following terms, inter alia:

(i) the loan was to be secured by way of first legal charge over the said property.

(ii) Clause 10(2) of the charge provides that the first defendant may from time to time make such payments as it consider expedient any work in connection with the construction of any roads, drains and other like things.

(iii) the loan was to be released direct to the said developer's account with the first defendant against the certificates issued by a firm of architect (the second defendant in the court below) from time to time certifying completion of the stages of the work.

(5) The first defendant had paid to the developer several progressive payments. However, the developer before completion of the property abandoned the project. At the stage when the developer abandoned the project, eight progressive payments had been made by the first defendant to the developer on behalf of the plaintiff

(6) The developer abandoned the project in January 1983 and with the help of the Ministry of Housing, works on the property was recommenced in 1985 and completed in 1988.

(7) The plaintiff challenged the payment by the first defendant of the eighth progressive payment to the developer when in fact the eighth progressive payment was not due for payment. The plaintiff did not challenge the payment by the first defendant to the developer of the earlier seven progressive payments.

(8) The first defendant denied that the payment of the eighth progressive payment was wrongful and argued that the eighth progressive payment to the developer were in accordance with the loan agreement entered into between the plaintiff and the first defendant.

(9) Being dissatisfied, the plaintiff instituted action against the first defendant and also the architect tin charge of the housing project as the second defendant.

(10) The plaintiff's claim against the first defendant are for damages for breach of its contractual duty under the loan agreement and damages for negligence in tort for mismanaging the account of the developer and for acting so irresponsible that adversely affected the developer's financial ability to perform its obligations towards the purchasers.

(11) The plaintiff's claim against the second defendant are for damages for negligence in tort in the issuance of unsubstantiated and unjustified certificates of completion of various stages of works in accordance with the schedule of

payment under the sale and purchase agreement and alternatively, damages for fraud in the issuance of unsubstantiated certificates of completion of various stages of works.

(12) The plaintiff however, during the trial specified her claim against the first defendant only for negligence and breach of contract and abandoned her claim based on fraud as against the second defendant.

THE PLAINTIFF'S CONTENTION

[3] At the High Court and in the appeal before us learned counsel for the plaintiff submitted that the case should be decided in favour of the plaintiff and an order be made that all interest charged by the first defendant on the eighth progress payment from the date of release to the date of relevant accounting be credited back to the plaintiff. Learned counsel for the plaintiff further submitted that an assessment be made by the Registrar as to the exact interest to be credited back to the plaintiff and that the first defendant to adjust the loan account of the plaintiff to deduct all interest wrongly debited to the plaintiff and that the repayment of the loan still owing by the plaintiff be restructured.

[4] It is the plaintiff's case that the interest on the progress payment should not be chargeable by the first defendant because of its breach of duty in wrongly releasing the sums involved to the developer. The certificate issued by the architect for the purpose of the progressive payment under the Sale and Purchase Agreement provides inter alia that, 'this is to certify that the roads and drains fronting the above houses have been completed.' The plaintiff's evidence was that at the time when the housing project was abandoned by the developer no roads and drains serving the houses had been completed. As such, the plaintiff contended payment under the eighth progress payment was not due at this stage. Learned counsel for the plaintiff referred to us *Paget's Law of Banking* (10 Ed, 1989) at p 202 where the common law principle is that the paying banker owes his customer a contractual duty of care in carrying out payment instructions.

THE FIRST DEFENDANT'S CONTENTION

[5] The first defendant contended that it was the standard practice of the first defendant as a bank on receipt of the architect's certificate to make progressive payments to the developer and to debit the purchasers' account. Generally, officers from the bank do not inspect the site to ascertain whether particular stage of the construction was completed as stated in the architect's certificate. The architect was bound to give a certificate whenever requested so by the developer who was his client. Therefore, at the stage when the developer requested for the architect's certificate, the architect will issue the certificate, not in accordance with the required certificate for payment, but one which merely stated the stage of construction when he visited the site.

[6] The first defendant further contended that there would be other payments subsequent to item 8 of the Schedule of Payments namely under item (9(i) and 9(ii).

Payments under the two items however were to be made at the request of the developer without sighting the architect's certificate. Under the sale and purchase agreement, the architect was deemed to be functus officio after the issue of the final certificate namely the certificate under item 8 of the schedule of payments. The first defendant treated item 8 as an interim payment under the schedule of payments and being an interim payment it was subject to adjustment on the final item of the schedule of payments. Therefore, payments under the roads and drains had to be submitted the way the developer did even though at that stage the roads and drains were not fully completed. This the developer did not do so as the project was abandoned. It is the first defendant's case that there was no breach of contract on their part as they were entitled to treat their customers' mandate at its face value save in extreme circumstances. The first defendant as the bank was not obliged to question the architect's certificate which was submitted in accordance with the mandate unless they had grounds for believing that the architect was misusing his authority.

DECISION OF THE COURT ON APPEAL

[7] Based on the evidence adduced before the learned judge of the High Court we find there is nothing to indicate that the first defendant as the bank had notice of the difference between the wordings of the architect's certificate when compared to that stated in the schedule of payment. In the absence of any such evidence, it is difficult to find that the first defendant even if it was under a duty to make inquiries, had made the payments wrongfully. We agree with the finding of the learned judge of the High Court that to impose on the bank any duty to ascertain the actual situation at the site or even for it to make inquiries would indeed place an onerous duty on the bank. It is our judgment that in the absence of clear evidence that the first defendant was aware of the actual situation, or that being aware that there was something amiss in the architect's certificate, when it made the payment, it could not be said that the first defendant was in breach of any of its duties.

[8] It must be noted in this case that it was an express term of the contract entered into between the plaintiff and the first defendant that funds were to be released direct to the developer's account against the architect's certificate. The relevant term of the loan agreement under the heading 'Availability of Loans/Mode of Advance' reads:

> Funds to be released direct to the developer's account as against the architect's certificate upon compliance of the following:
>
> (1) after all legal and charge documents have been duty executed and presented for registration and the property confirmed free from encumbrances by solicitors at the time of presentation;
>
> (2) after all difference between the purchase price and the loan approved has been paid and confirmed by the developer;
>
> (3) after a processing fee of RM200 has been paid.

[9] Thus, under the terms of the contract there was no duty on the part of the first defendant to go behind the architect's certificate. Neither was the first defendant competent to do so. On 22 October 1982, the plaintiff created a first legal charge against the property held under HS(D) 26886, PT No 586 Section 94 Kuala Lumpur

in favour of the first defendant as a security for the loan of RM138,600. By the terms of the charge the plaintiff certified that he had received the said sum from the first defendant. In the premises it cannot be said the plaintiff had not received the loan. It follows that he is liable to pay the loan in full. The allegation that the first defendant had been negligent and/or reckless in managing the finance of the housing project is tantamount to putting an extra duty on the first defendant of its contractual obligation both under the contract and under the charge.

[10] As regards the plaintiff's contention that at the time when the housing project was abandoned by the developer, no roads and drains serving the houses had been completed, we are of the view in any housing project, the roads and drains would be given a final touch-up just before delivery. In the present case, however, before the final touch-up could be done the project was abandoned. The fact however remained that the access road was partially completed with a crusher run of stones but with no premix whilst the roads fronting the houses had no premix (see the evidence of the architect at p 251 of the appeal record). We also find that as the developer had to adhere strictly to the schedule of payments annexed to the sale and purchase agreement, they had to submit a certificate for roads and drains before they could claim against the subsequent item direct from the first defendant. In the meantime the developer would complete the works on roads and drains before delivering the houses to the purchasers. In the circumstances of the case we are of the view that there was no irregularity in the developer submitting the No 8 Certificate as they did and it follows that there was no negligence or breach of contract on the part of the first defendant to release the payments.

[11] On the issue of discrepancy in the certificate issued by the architect as alleged by the plaintiff in this appeal, we find there is no standard format in the profession of architects to use for certificates issued under the schedule of payments. The contention that the words in the schedule of payments did not tally with the description in the certificate is therefore de minimis. It was a minor and immaterial error. Minor and immaterial errors will not invalidate a certificate (see the case of *Emson Contractors Ltd v Protes Estates Ltd* (1987) 39 BLR 126).

[12] On the common law principle that the paying banker owes his customer a contractual duty of care in carrying out payment instructions as stated in *Paget's Law of Banking* (10th Ed, 1989) p 202 which was referred to and relied on by learned counsel for the plaintiff we find it is not relevant to the present case. The principle is only applicable to cases dealing with communications which the customer send to the bank. On this point we would refer to the case of *Hilton v Westminster Bank Ltd* (1926) 123 LT 358 wherein an action was brought for damages of negligence against the bank in paying a cheque of the customer upon presentation, and the negligence alleged was that the bank paid the cheque after receiving notice of countermand or alternatively after having received instructions which should have put them on inquiry as to the exact meaning of the instructions which they had in fact received. At p 362 Atkin J said: 'I think it is the duty of the bank, arising out of the contract to exercise reasonable care and skill in dealing with communications which the customer sends to them in relation to his banking business.' In the present case it must be noted that the court is dealing with an architect's certificate.

[13] It is our judgment that this case has to be decided on the proper interpretation of the contract entered into between the first defendant and the plaintiff. The express terms as provided for in the loan agreement are clear. The plaintiff has expressly authorized the first defendant to release the progressive payments directly to the developer's account as against the architect's certificate. The case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 79 relied on by the plaintiff is totally irrelevant and has no application to the facts and circumstances of the present case. In that case, the Supreme Court decided that the overdraft loan as understood by the bank, the borrower and the trial judge was in actual fact a term loan and being a term loan the recall by the bank was premature. In the present case we find the learned judge of the High Court was right in taking the view that unlike the situation in *BBMB v MAE Perkayuan Sdn Bhd*'s case, where the bank was under a duty to conduct periodical survey of the housing project, there was no similar duty imposed on the first defendant to ascertain the veracity of the architect's certificate, or to ascertain whether the said works had in fact been completed.

CONCLUSION

[14] For the reasons above stated we unanimously dismissed the plaintiff's appeal with costs. We ordered the deposit is to be paid to the first defendant on account of taxed costs.

Appeal dismissed.

Reported by Brendan Navin Siva